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WHEN IS STATE LAW APPLIED TO FEDERAL ACQUISITIONS OF REAL PROPERTY

Lawrence Berger*

I. INTRODUCTION

Since the *Clearfield Trust* case¹ established that in federal

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¹ *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). In that case, a salary check drawn on the United States and made out and sent to one Barner, a WPA employee, somehow never reached the latter. Someone forged and cashed the check with the J.C. Penney Co., which endorsed it to defendant Clearfield Trust Co. Clearfield in turn endorsed to the Federal Reserve Bank of Philadelphia and guaranteed prior endorsements. The United States did not notify Clearfield of the forgery until about eight months after the above transactions, though an agent of the United States had information that the check was missing a few days after those events. The United States sued Clearfield in federal court on its endorsement and Clearfield defended under Pennsylvania decisions holding that a drawee cannot recover from an endorser where he unreasonably delays in giving the endorser notice of the forgery. The question for decision, thus, was whether *Erie* required the federal court to apply state commercial law, or whether the federal court was free to fashion its own common law in determining the rights of the parties. The district court held itself bound by state law. The court of appeals reversed. The United States Supreme Court, in affirming the court of appeals, gave a very explicit answer to this question:

"We agree with the Circuit Court of Appeals that the rule of *Erie R. Co. v. Tompkins* . . . does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. . . .

"In our choice of the applicable federal rule we have occasionally selected state law. . . . But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the

question cases,² the rights and liabilities of the United States normally must be governed by a federally fashioned common law, there has followed a plethora of cases involving many different areas in which that doctrine has been applied. For example, in the area of federal government contracts, it was held that the federal courts would not be bound by state decisional law, but would fashion their own rules concerning governmental liability.³ A similar rule was held to apply in a tort case involving the govern-

rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain." *Clearfield Trust Co. v. United States*, *supra* at 366-67.

- ² The use of the term "federal question" to describe the *Clearfield* type of case is to a degree inaccurate but is a necessary shorthand. The *Erie-Clearfield* dichotomy is commonly thought to be between the diversity of citizenship and federal question jurisdictions of the federal courts. See, e.g., Mr. Justice Jackson's concurring opinion in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 471-72 (1942). But Professor Moore, citing many cases in a good discussion of the subject, takes a more refined view of the problem: "It is true that in the bulk of diversity cases the substantive issues are non-federal and hence state substantive law is determinative; and, conversely, in the bulk of cases where jurisdiction is predicated upon some other basis federal law is determinative. But this is not always true. For example, a case that is in the federal court solely on the basis of diversity may turn upon a defense predicated upon the Constitution or a federal statute; and state law certainly does not rule the defense. On the other hand, a case may be in the federal court on some jurisdictional basis other than diversity and yet the cause of action or determinative issue may be a state claim or issue upon which state law speaks with finality." 1A MOORE, *FEDERAL PRACTICE* ¶ 0.305[3], at 3054-55 (2d ed. 1961). See also 1A *id.* ¶ 0.324.

Thus, the question is not what is the source of the court's jurisdiction, but what is the nature of the issue for the court's determination. If the claim or defense "arises out of" state law, state law should govern. Likewise, if the claim or defense "arises out of" federal law, federal law should normally govern. But this, too, we shall see, is an oversimplification, because the scope of the application of state law will vary according to source of the court's jurisdiction. See discussion accompanying note 7 *infra*. See also in the general area of choice of law in nondiversity litigation: 1 BARRON & HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE* § 8 (1960); Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66 (1955); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957); Note, *Clearfield: Clouded Field of Federal Common Law*, 53 COLUM. L. REV. 991 (1953); *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428 (1960).

- ³ *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947); *United States v. Standard Rice Co.*, 323 U.S. 106 (1944).

ment's right to recover for the loss of services and hospitalization of a United States soldier negligently injured by defendant.⁴ And it was held that the question of the existence of a lien of the United States and its priority over state-created liens was a matter for federal determination.⁵

Of course, this does not mean that, in federal question cases involving the United States as a party, state law is never applicable. As Mr. Justice Rutledge said in *United States v. Standard Oil Co.*:

It is true, of course, that in many situations, and apart from any supposed influence of the *Erie* decision, rights, interests and legal relations of the United States are determined by application of state law, where Congress has not acted specifically. 'In our choice of the applicable federal rule we have occasionally selected state law.' *Clearfield Trust Co. v. United States*, 318 U.S. at 367. The Government, for instance, may place itself in a position where its rights necessarily are determinable by state law, as when it purchases real estate from one whose title is invalid by that law in relation to another's claim. Cf. *United States v. Fox*, 94 U.S. 315. In other situations it may fairly be taken that Congress has consented to application of state law, when acting partially in relation to federal interests and functions, through failure to make other provision concerning matters ordinarily so governed. And in still others state law may furnish convenient solutions in no way inconsistent with adequate protection of the federal interest.⁶

The above opinion seems to state that the extent and mode of application of state law called for in these federal question cases may be entirely different from those cases where the *Erie* doctrine is involved. Where *Erie* applies, the federal court is entirely bound by what the state law is. Indeed, the court is powerless to declare what the federal law is, because there is no federal law governing at all. However, in the federal question area, this is arguably not at all true. It is the federal court that is declaring what the law is and it may in its discretion refer to state law for the resolution of some but not all issues in the case.⁷ The issue of

⁴ *United States v. Standard Oil Co.*, 332 U.S. 301 (1947).

⁵ *United States v. Brosnan*, 363 U.S. 237 (1960); *United States v. Acri*, 348 U.S. 211 (1955).

⁶ 332 U.S. 301, 308-09 (1947). In addition, of course, Congress may deliberately and expressly subject the rights of the United States to application of state law. This was done in the Federal Tort Claims Act, which provides for adjudication of certain tort claims against the United States "in accordance with the law of the place where the act or omission complained of occurred." 28 U.S.C. §§ 1346(b), 2674 (1958).

⁷ The distinction is strongly argued and documented in Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the*

when the court should exercise its discretion in one way or the other has been the subject of a substantial amount of litigation in many different areas.

The purpose of this article is to analyze the cases prior and subsequent to *Clearfield* involving the question of what law the United States courts apply when the federal sovereign is acquiring real property. These cases, which necessarily involve almost exclusively federal condemnation matters, indicate that both the *Clearfield* doctrine and the limitation thereon amplified in *United States v. Standard Oil* are applicable; i.e., that both federal and state rules may come into play. An attempt will be made herein to reconcile these cases and formulate some criteria for a proper resolution of the issues involved. Before this is undertaken, however, it will be necessary to describe very briefly the history of federal condemnations in order that the problem may be more completely understood.

II. THE BACKGROUND⁸

For almost 100 years after its founding, it was the practice of the United States to resort to state courts and obtain the consent of the state legislature when it wanted to condemn lands within a state. However, in 1875, in *Kohl v. United States*,⁹ the United States Supreme Court held that federal condemnations could properly be had in federal courts and without the consent of the state legislatures. From that time forward, most such condemnations were actually had in federal court, though Congress in individual condemnations continued the former practice to a degree.¹⁰

Choice of National and State Rules For Decision, 105 U. PA. L. REV. 797, 802-06 (1957).

A completely contrary position is argued in *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428, 1448-49 (1960). There it is stated that the Rules of Decision Act compelling the application of state law in diversity cases under *Erie* also is fully applicable to non-diversity cases. The argument is sound on the basis of logic and early history, but the courts do not presently even discuss the act in their opinions on these problems. They are apparently assuming it is not applicable. The modern case law does back up the assertion of a dichotomy made by Professor Mishkin.

⁸ See 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1515 (1958); 6 NICHOLS, EMINENT DOMAIN §§ 27.1, 27.2 (3d ed. 1953); 1 NICHOLS, EMINENT DOMAIN §§ 1.24, 2.13 (3d ed. 1950).

⁹ 91 U.S. 367 (1875).

¹⁰ See *United States v. Jones*, 109 U.S. 513 (1883).

Kohl left unanswered the question of what law should be applied in those proceedings. With respect to *procedure*, the Conformity Act of 1872¹¹ was probably applicable to make federal cases conform to the state practice existing at the time of suit.¹² But the matter was made explicit in 1888 by a special statute which specifically authorized the federal courts to handle federal condemnations and required conformity to local practice "as near as may be."¹³ In addition, scores of special statutes prescribed different procedures for different types of condemnation proceedings.¹⁴ The result was a patchwork of over 250 different procedures in the federal courts. This situation obtained until Rule 71(a) of the Federal Rules of Civil Procedure became effective August 1, 1951. The basic effect of the latter was to prescribe a uniform procedure under the federal rules for all condemnation matters in the federal courts. Rule 71(a) is still in effect today.

III. THE BASIC CASE LAW

The governing statute, enacted in 1888, provided in part as follows:

The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.¹⁵

There were several limitations engrafted by the courts upon the requirement of conformity, some readily deducible from the wording of the statute and some not. Conformity was not required: (1) where it would necessarily involve an unintended waiver of federal sovereign immunity, *e.g.*, in the imposition of costs against the government;¹⁶ (2) where it would be contrary to an express enactment of Congress and therefore "necessarily and unwisely encumber the administration of justice"¹⁷ (thus, a state law requiring two separate juries to determine the issues in

¹¹ Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197.

¹² *Carlisle v. Cooper*, 64 Fed. 472 (2d Cir. 1894).

¹³ Act of Aug. 1, 1888, ch. 728, § 2, 25 Stat. 357 (formerly 40 U.S.C. § 258).

¹⁴ 3 BARRON & HOLTZOFF, *op. cit. supra* note 8, § 1515.

¹⁵ See note 13 *supra*.

¹⁶ *United States v. Knowles Estate*, 58 F.2d 718 (9th Cir. 1932); *Carlisle v. Cooper*, 64 Fed. 472 (2d Cir. 1894); *United States v. Wade*, 40 F.2d 745 (E.D. Idaho 1926).

¹⁷ *Chappell v. United States*, 160 U.S. 499, 514 (1896).

a condemnation case would not apply, because it would be contrary to acts of Congress governing jury trials of cases at law¹⁸); and (3) when the issue is one of substantive rather than procedural law. This result would be obvious from the fact that on its face the Conformity Act applied only to "practice, pleadings, forms and modes of proceeding." Likewise, a similar situation would prevail under Rule 71(a), which deals with procedure. Purportedly on the basis of this substance-procedure distinction, federal law was held to govern such matters as the measure of compensation,¹⁹ the procedure for determination of whether the taking was necessary,²⁰ the time when interest runs on a judgment in condemnation,²¹ the presence or absence of a requirement that the government attempt to purchase by negotiation as a prerequisite to condemnation,²² the right to recover for loss of possession pending condemnation,²³ and the territorial jurisdiction of the federal courts' process.²⁴ In addition, and for the same reason, such matters as the extent of the estate taken,²⁵ admissibility of evidence relating to damages,²⁶ and the question of whether indeed there was a taking at all²⁷ were for federal determination. However, it should be noted that, just as in other areas, the distinction be-

¹⁸ This was the holding of *Chappell v. United States*, 160 U.S. 499 (1896). It should be noted that a similar standard was used by the courts with respect to the general Conformity Act of 1872. *Indianapolis & St. L.R.R. v. Horst*, 93 U.S. 291, 300 (1876). And see *WRIGHT, FEDERAL COURTS* § 61 (1963).

¹⁹ *United States ex rel. TVA v. Powelson*, 319 U.S. 266 (1943); *United States v. Miller*, 317 U.S. 369 (1943); *United States v. Alcorn*, 80 F.2d 487 (9th Cir. 1935); *Town of Nahant v. United States*, 136 Fed. 273 (1st Cir. 1905); *United States v. 2902 Acres of Land*, 49 F. Supp. 595 (D. Wyo. 1943); *United States v. 2715.98 Acres of Land*, 44 F. Supp. 683 (W.D. Wash. 1942).

²⁰ *In re Condemnations for Improvement*, 266 Fed. 105 (E.D. Mich. 1920); *United States v. O'Neill*, 198 Fed. 677 (D. Colo. 1912).

²¹ *Brown v. United States*, 263 U.S. 78 (1923); *United States v. Mahowald*, 209 F.2d 751 (8th Cir. 1954); *United States v. Certain Lands*, 129 F.2d 577 (2d Cir. 1942). It should be noted that in the first case the court chose to follow state law after stating it was not bound to do so.

²² *In re Secretary of Treasury of United States*, 45 Fed. 396 (C.C.S.D. N.Y. 1891); *United States v. 80 Acres of Land*, 26 F. Supp. 315 (E.D. Ill. 1939); *United States v. Crary*, 1 F. Supp. 406 (W.D. Va. 1932).

²³ *Kanakanui v. United States*, 244 Fed. 923 (9th Cir. 1917).

²⁴ *Sewchulis v. Lehigh Valley Coal Co.*, 233 Fed. 422 (2d Cir. 1916).

²⁵ *United States v. Kansas City, Kan.*, 159 F.2d 125 (10th Cir. 1946).

²⁶ *United States v. 3595.98 Acres of Land*, 212 F. Supp. 617 (N.D. Cal. 1962).

²⁷ *Harris v. United States*, 205 F.2d 765 (10th Cir. 1953).

tween substance and procedure tended to break down, and the cases, on analysis, seemed to foreshadow the "outcome test" of the *Guaranty Trust* case.²⁸ Thus, it was said that federal law would govern an apparently procedural matter, if the question went to the landowners' "fundamental right."²⁹ On the other hand, as we shall see below in detail, state law was held to govern substantive matters where that choice seemed appropriate.

A. THE SUBSTANTIVE-PROCEDURAL DISTINCTION FURTHER CONSIDERED

Though there was some surface appeal in using the substantive-procedural distinction to solve all the problems under the Conformity Act, it became apparent that the indiscriminate use of such a standard would lead to unsound results. There was found to be a broad area for the appropriate application of state law to substantive issues. This consisted mainly of those matters which are traditionally viewed as involving rights arising out of and normally enforced by state law. For example, as between two private parties, the issue of who owns Blackacre in its normal context is one solved by application of state common law and statutes. That issue also often arises in a federal condemnation proceeding. If the conflict is between parties A and B as to who owns the condemned property and is therefore entitled to the award, this should be resolved in the federal court by reference to the body of state law which governs the issue. This is exactly what the federal courts have done. Thus, where the United States wants to condemn a fee simple, and the determination of who presently owns the property depends upon construction of a will, the state property law will be referred to,³⁰ and the issue of who among competing parties was the lessee of an oil and gas lease and thus entitled to compensation will be referred to state law, even to the extent of staying a federal proceeding to await the outcome of a pending state action.³¹ Likewise, where the United States is condemning leasehold interests, the duration of the

²⁸ *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). This, of course, was the case that held in effect that the state "substantive" law which the federal courts had to apply under *Erie* included state "procedural" law, if the failure to use the latter would lead to a substantially different result than that which would be reached if the case were actually tried in the state court.

²⁹ *United States v. O'Neill*, 198 Fed. 677, 682 (D. Colo. 1912). The procedural matter was a state requirement that a commission determine the taking is necessary before the condemnation is valid.

³⁰ *United States v. 0.20 Acre of Land*, 71 F. Supp. 576 (W.D. Pa. 1947).

³¹ *United States v. Adamant Co.*, 197 F.2d 1 (9th Cir. 1952).

tenant's interest must necessarily be measured by the property law of the state.³² In addition, the question of whether the landlord or the tenant owned improvements erected upon the property by the tenant is a matter for state law.³³ And it has even been held that state law will govern whether a condemnation ipso facto terminates a lessee's interest so as to make it noncompensable.³⁴

If state law should govern the question of whether *A* or *B* owns the property, it logically follows that it should also determine whether *A* or *B* or nobody at all has a lien on the property.³⁵ Accordingly, it has been held that the question of whether there is a municipal lien for taxes upon property to be federally condemned is a question of state statutory interpretation, the obligation of the federal government being to pay, in total, a sum equal to the value of the land as if owned unfettered by one person.³⁶

The federal courts have also looked to state law for definition of an interest where the nature of that interest may determine whether it is compensable or not. For example, it has been held that the issue of whether a building is personalty which is not subject to condemnation, or realty which is so subject, is a question for state law.³⁷ And where the fee in realty was owned by one person and the mineral rights by another, whether the latter was a fee simple or mere incorporeal interest was a matter for state law, the measure of compensation being for federal law.³⁸ Likewise, where land burdened with a water assessment payable to a nonprofit water company is condemned, the nature of the water company's interest will ordinarily be defined by looking to the state law, again the measure of compensation being for federal law.³⁹

³² *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. 70.39 Acres of Land*, 164 F. Supp. 451 (S.D. Cal. 1958).

³³ *United States v. 15.3 Acres of Land*, 154 F. Supp. 770 (M.D. Pa. 1957).

³⁴ *United States v. 70.39 Acres of Land*, 164 F. Supp. 451 (S.D. Cal. 1958).

³⁵ Unless, of course, the lien is federally created.

³⁶ *United States v. 25.936 Acres of Land*, 153 F.2d 277 (3d Cir. 1946); *United States v. 232.68 Acres of Land*, 57 F. Supp. 891 (W.D. Tenn. 1944). See also *United States v. Certain Space*, 167 F. Supp. 357 (N.D. Ill. 1958).

³⁷ *United States v. 19.86 Acres of Land*, 141 F.2d 344 (7th Cir. 1944).

³⁸ *United States v. 4.533 Acres of Land*, 208 F. Supp. 127 (N.D. Cal. 1962).

³⁹ *Adaman Mut. Water Co. v. United States*, 278 F.2d 842 (9th Cir. 1960).

B. CASES APPLYING FEDERAL LAW TO STATE RELATED ISSUES

On the other hand, it is not in every case involving rights apparently springing from state law that the courts will apply it. There is a strong line of cases that seems to engraft broad limitations upon the rule. This was first made explicit by the United States Supreme Court in *United States ex rel. TVA v. Powelson*.⁴⁰ That case involved issues in the measure of damages and the definition of private property in federal condemnation. The claim of the condemnee was that it also had the power of eminent domain under state law and that the lands to be condemned would have been assembled by it into a larger, more valuable tract, and that this should be considered in the award. With respect to that contention, the Court said:

The right of the United States to exercise the power of eminent domain is 'complete in itself' and 'can neither be enlarged nor diminished by a State.' . . . Though the meaning of 'property' as used . . . in the Fifth Amendment is a federal question, it will normally obtain its content by reference to local law. Yet when we look to local law in the present case, we find no indication that for purposes of condemnation proceedings instituted by North Carolina the value of the lands in question would be increased by reason of respondent's privilege to use the power of eminent domain. So far as constitutional compulsions are concerned, it is plain, as we have noted, that that factor need not be included in case the state were the condemnor. Moreover, the result in the present case is not different if we assume with the District Court . . . that respondent's 'prior right' under North Carolina law 'constituted a valuable right, which is destroyed by this condemnation proceeding.' It does not follow that that 'prior right' was 'private property' within the meaning of the Fifth Amendment which was taken by the United States.⁴¹

The Court then went on to examine as a matter of federal law whether the unexercised power of eminent domain was itself "private property" which could not be taken without payment of compensation. The Court decided on its own reasoning that it was not such property. Thus, it left clearly to federal determination a matter which, viewed from the perspective of cases heretofore discussed, was for the state; viz., the definition of property. It had indicated that, though that question was for federal determination, normally state law would be referred to. But the Court, after first looking to state law, said it was irrelevant to the final determination and never really indicated why the normal rule was not here to be followed. *Powelson*, thus, left unanswered the

⁴⁰ 319 U.S. 266 (1942).

⁴¹ *Id.* at 279-80.

question of when federal law and when state law should be applied to the definition of property.⁴²

Much was clarified a few years later, however, when the Eighth Circuit was presented with a related problem in *Nebraska v. United States*.⁴³ In that case, the United States was seeking to condemn lands owned by the State of Nebraska and received by it for its common school system. The State had leased some of the acreage to private individuals. The trial court had instructed the jury to deduct the fair market value of the leasehold interests from the value of the land to arrive at an award for the State. The State had contended that under pre-existing Nebraska case law, the State holds title to the lands as a trust for the schools and may not authorize an alienation of the fee unless it receives the full value of the lands involved. In affirming the trial court, the court of appeals rejected the application of state law to this situation.

What constitutes property and what is just compensation for it in a condemnation by the United States are not questions of state law but of federal law. . . . Of course, the term 'property' in such a situation normally will be given the same content as in state law. . . . This does not mean, however, that every local idiosyncrasy or artificiality in a state's concepts, or the incidents thereof, necessarily will be accepted. Thus, the United States could hardly be expected to recognize for condemnation purposes any such local artificiality in property concept as that a leasehold is not in any sense a dilution of fee rights but in point of law and regardless of fact adds body and value to the property.⁴⁴

This case might simply be viewed as reaffirming the principle discussed above, that in federal condemnation the measure of compensation is a federal question. The court actually rested its opinion on that point. However, it also indicated it was dealing with a special rule of property which was unacceptable in federal court because it was "artificial." Certainly a rule that a state can not alienate certain lands which it does not fully own without receiving their full value as though unencumbered could be viewed either as a rule of property or as a measure of compensation. What label is attached to the problem, however, would seem to be unimportant. It is the court's approach that is significant and that was to look to federal law when federal interests are apparently jeopardized by state law, no matter into what legal pigeonhole the problem is conceptually placed.

⁴² It does buttress, however, Professor Mishkin's view of the *Erie-Clearfield* dichotomy. See text accompanying note 7 *supra*.

⁴³ 164 F.2d 866 (8th Cir. 1947).

⁴⁴ *Id.* at 867-68.

Another case involving the application of the same principle is *United States v. Certain Interests in Property in Champaign County*.⁴⁵ That was a case involving the federal condemnation of a lessee's interest in Wherry housing, in which the land was owned by the United States but leased for seventy-five years to defendants. The lessee's interest was mortgaged to a third party. The trial court had held that Illinois law applied to the definition of the property interest the government could condemn, that there was no such interest as a leasehold subject to a mortgage in Illinois, because in Illinois a mortgagee has only a lien and not title; and further, that the entire leasehold, including the mortgagee's interest must be condemned with the condemnation award subject to the lien of the mortgage. The practical effect of this holding was to give defendants 6% interest on the award from the date of taking until the date of payment of the judgment, a period of fourteen months. Since the interest the defendants would have to pay to the mortgagee was only 4%, this amounted to a profit of 2% on the amount of the award, thus netting defendants an extra \$148,000. The government had contended below that federal law should apply; that under federal law there *was* such an interest as a leasehold subject to a mortgage; and that the award to defendants should, therefore, be the value of the leasehold less the amount of the mortgage. The view contended for by the government would have resulted in saving the government the \$148,000 profit above mentioned. In reversing the district court and holding that federal law does apply, the Seventh Circuit Court of Appeals distinguished another earlier condemnation case saying:

The district court reasoned that its holding was dictated because Illinois is a lien theory state and state law governs, citing *Swanson v. United States*, 9 Cir., 1946, 156 F.2d 442, 447, 170 A.L.R. 258, certiorari denied, *Spokane Portland Cement Co. v. Swanson*, 329 U.S. 800, 67 S.Ct. 492, 91 L.Ed. 684, for the proposition that the mortgagee's rights are determined by state law. We think the district court's reliance on *Swanson* is misplaced. In that case, the dispute was between the mortgagor and the mortgagee as to their respective rights, and the court properly held that the extent of the title or right of one condemnee as opposed to another condemnee is determined by local law when such a dispute arises in the course of federal condemnation proceedings. No direct federal interest was involved. In the case before us here we have an entirely different question presented. There is no dispute here between defendants and the mortgagees, the latter not even being parties to this proceeding. The sole issue is whether the United States has the power to condemn only

⁴⁵ 271 F.2d 379 (7th Cir. 1959).

the interests of defendants and to exclude the rights of others not made parties.⁴⁶

The court then went on to discuss the Supreme Court opinion in *United States v. 93,970 Acres of Land*, discussed *infra*, and concluded by saying:

Condemnation being an essential governmental function and Congress not having chosen to make state law applicable to the definition of property interests condemned by the government, it follows that the United States is not limited to condemnation in terms known to the state, but rather may define such interests in terms of federal law.⁴⁷

It is when *United States v. Nebraska* and the *Champaign County* case are read in connection with *Powelson* that the significance of the latter finally begins to become clear. The reasons for decision more specifically articulated in *United States v. Nebraska* are fully applicable to *Powelson*. These cases all arguably involved the definition of a property right; all were concerned with the possible application of an "artificial" or atypical state rule;⁴⁸ all might have resulted in a higher award than fair market value as federally defined, if state law were applied, and, of course, all three resulted in the application of a federal rule to avoid just that result.

It should be noted that this approach involves federal consideration of the substantive content of the state law with regard to the point at issue and federal rejection of that state law if it reaches an atypical result. The reason for this is clear. "Since the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that program."⁴⁹ Thus, since the application of state law is discretionary, properly, its effect upon the federal program must be considered to determine whether it would not frustrate that program.

It is not only where there is an artificial state rule involving greater federal liability that federal law has been applied, however. The case of *John Hancock Mut. Life Ins. Co. v. Casey*⁵⁰ is in point. There the United States had condemned a term of years in a hotel owned by the condemnee and mortgaged to John Hancock.

⁴⁶ *Id.* at 383.

⁴⁷ *Id.* at 384.

⁴⁸ Though *Powelson* really dealt with a hypothetical state rule.

⁴⁹ Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 805-06 (1957).

⁵⁰ 147 F.2d 762 (1st Cir. 1945).

The condemnee had gone into reorganization pursuant to Chapter X of the Bankruptcy Act, after having amortized \$22,000 of the \$345,000 mortgage. The issue for decision was whether the rental payments owed by the federal government under its condemned leasehold were to be paid in full to the mortgagee or only to the extent of the payment provided for by the mortgage itself. The court decided that, under the federal statutes involved,⁵¹ this was a matter not for state but for federal law, saying: "... Massachusetts law does not control the distribution of the condemnation deposit as between mortgagor and mortgagee, though such state law does define the extent of the mortgagee's rights in the real estate by way of security at the date of taking."⁵² The court then went on to hold the mortgagee entitled to take only up to the yearly amount provided for in the mortgage.

A year later, the Ninth Circuit was faced with a similar problem in *Swanson v. United States*.⁵³ In that case, the 340 acre tract to be condemned was part of a 3000 acre tract under mortgage. At the time of taking, the mortgage had been foreclosed and the mortgagee had already bought in at foreclosure. However, under the law of the State of Washington, the mortgagor still had a right to redeem after foreclosure and this right still had six months to run at the time of taking. In fact, the land was never redeemed by the mortgagors. The issue for the court was to determine how the award in condemnation should be distributed. The mortgagors contended they were entitled to the entire fund, while the mortgagees claimed an amount sufficient to satisfy their mortgage. The trial court held for the mortgagees and awarded the balance in excess of the principal amount of the mortgage to the mortgagor. On appeal the court was faced with two problems: (1) What are the property rights of mortgagor and mortgagee after foreclosure but before the period for redemption has run? (2) Considering these property rights, how should the award be distributed? The court held that state law governs the first problem, but federal law the second. It followed Washington law, which held the mortgagor can still be the owner after foreclosure, but determined the distribution on its own authority. The court held that the mortgagees were entitled only to the principal amount of the mortgage still unpaid and that the value of the

⁵¹ "The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable." 40 U.S.C. § 258(a) (1959).

⁵² 147 F.2d at 766.

⁵³ 156 F.2d 442 (9th Cir. 1946).

noncondemned portion of the tract should be deducted from said principal and any deficiency paid to the mortgagee, the balance going to the mortgagor.

In some ways it is more difficult to justify the *Swanson - John Hancock* rule than it is *Powelson* and *United States v. Nebraska*. The latter involve the obvious federal interest that the Government not overpay in condemnation. But in *Swanson*, as well as in *John Hancock*, the dispute was not over the total federal liability, but over how a conceded sum should be distributed. The argument would run that if state law is referred to, to determine the respective interests of the claimants, that approach as to distribution among those claimants should also be controlling. Such an argument, it is submitted, is based upon the premise that state law *prima facie* applies to these matters. Aside from the fact that the *Clearfield* case clearly rejects that premise, there was an additional reason not to apply state law. There was here a specific statutory injunction upon the courts to make such distribution "as shall be just and equitable."⁵⁴ Clearly, Congress, which has plenary power to determine what law should be applied to its programs, contemplated that the determination of "just and equitable" be made by the court deciding the case. The court so held.

C. THE LATEST SUPREME COURT CASE

No discussion of this area would be complete without commenting on the latest United States Supreme Court case, *United States v. 93,970 Acres of Land*.⁵⁵ In that case, a lease of an airfield by the United States to respondent reserved in the Government a power of revocation in the event of a national emergency. The preamble to the lease recited that, because of the strategic value of the property, the Government considered it essential to retain it in a standby status for *aviation*. In August, 1954, it was decided to use the field as a *missile site* and notice of revocation was sent. In addition, a condemnation proceeding was begun in the event the power of revocation was held to be ineffectual, because the preamble to the lease seemed to limit the power to a case where the Government wanted the site back as an airfield. The court below held that, by bringing condemnation, the Government had elected to abandon its prior revocation, and, on this basis, the Government should pay compensation to the lessee for taking away its airfield. In dealing with the issue of whether the state

⁵⁴ See note 51 *supra*. On the same point, see *United States v. Certain Lands*, 129 F.2d 577 (2d Cir. 1942).

⁵⁵ 360 U.S. 328 (1959).

doctrine that the United States had elected its remedy applies, the Court said:

Respondents argue, however, that election of remedies is part of the law of Illinois and that Illinois law applies here. We cannot agree with this view. Condemnation involves essential governmental functions. See *Kohl v. United States* We have often held that where essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make state laws applicable. It is apparent that no such choice has been made here.⁵⁶

The Court went on to hold that the lease properly construed allowed the Government to revoke in this situation and that the United States was not barred from doing so by any doctrine that it had elected the remedy of condemnation. It should be noted that, in this property litigation, the Court cited the *Clearfield Trust* case for the proposition that where essential interests of the federal government are concerned, federal law must govern. Although this case might be rationalized merely on the basis that the doctrine of election of remedies is a procedural matter which would be for the federal courts anyway, the reach of the Supreme Court opinion is much broader than just that. In fact, the Court never mentioned the substance-procedure approach at all. The case is further evidence of the Court's general predisposition in the federal question area to apply federal law wherever the "essential interests" of the national government are concerned. These essential interests are involved in condemnation where application of state law will either unduly increase the amount of the award or, as in this case, require condemnation where under federal law no condemnation is necessary.

D. A UNIFIED APPROACH TO THE CASES

Are these cases refusing to apply state law to matters ordinarily arising from such law sound? What should be the criteria to determine whether to apply state law? Of course, there is no formula to guarantee an "ideal" solution. It is submitted that at least the following issues weighing and counterbalancing one another must be thrown onto the scales:

(1) Has Congress expressly decided the issue of which law applies? If it has, all other considerations become irrelevant. There is no doubt of Congress' power to refer matters to state law in the federal question area if it so chooses.⁵⁷ This approach sat-

⁵⁶ *Id.* at 332.

⁵⁷ *Ibid.* And see *City of Fresno v. California*, 372 U.S. 627 (1963).

isfactorily explains both the *John Hancock*⁵⁸ and the *Swanson*⁵⁹ cases, though in those cases the choice of federal law was more implied than express.

(2) Would the state law, if applied, contravene a specific federal statute? If it would, then clearly the court ought not in its discretion apply the state law.⁶⁰

(3) Would such law frustrate Congress' purpose in enacting the federal program under consideration? Here again such law ought not be applied. Under this category would come such cases as *Powelson*⁶¹ and *Nebraska v. United States*.⁶² The application of an atypical property rule would in those cases have resulted in greater federal liability and to that extent frustrated a congressional program to provide only "just" compensation to the condemnees.

(4) Is uniformity of result across the country desirable with respect to this particular issue?⁶³ If it is, then a federal rule may be appropriate. Such an approach assumes, of course, that a federal rule tends to promote uniformity. This is questionable in view of the fact that the Supreme Court is unlikely to involve itself in such issues as these and the courts of appeal may reach inconsistent results. Nevertheless, the uniformity approach probably can be of help. For example, uniformity of substantive result in the several states might be desirable with respect to the measure of compensation. The fact that lands of the same value are located in different states ought not to mean disparate compensations to their respective owners. On the other hand, if the issue is who owns the condemned property, that determination ought not to differ whether the tribunal is state or federal. Thus, uniformity within the state may become a deciding factor.

IV. CONCLUSION

As in other areas involving the federal question jurisdiction, the question of when federal or state law applies to governmental acquisitions of property is a problem where "simple generalizations are not possible."⁶⁴ In this narrow area, however, certain

⁵⁸ See note 47 *supra*.

⁵⁹ See note 50 *supra*.

⁶⁰ See text accompanying notes 17 and 18 *supra*.

⁶¹ See note 40 *supra*.

⁶² See note 43 *supra*.

⁶³ On this issue, see Mishkin, *supra* note 49, at 813.

⁶⁴ 1A MOORE, FEDERAL PRACTICE ¶ 0.323[22] (2d ed. 1961).

principles may be noted. First, as in the entire federal question area, the court here is not compelled in the *Erie* sense to apply state law. As Justice Jackson said in *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*⁶⁵ in connection with another problem: "In some cases it [the court] may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state."⁶⁶

In the area of procedure, federal law presently governs. Generalizations about substantive law are more difficult to sustain. Certain areas, such as the measure of compensation, are held to be matters of exclusive federal domain. But in many areas, the federal courts normally have looked to the states for a ready-made body of law to resolve those private law issues which are deemed to arise out of state law. These have tended to cluster around the following questions: As between contending parties, who owns the condemned property? What is the duration and extent of the owner's interest? Who has, and what is the extent of, the lien upon the property? What is the nature of the property interest which is being condemned? Nevertheless, the federal courts do not inflexibly apply state law to such issues. Where the application of an atypical state rule will result in an award in excess of the fair value of the property, the federal courts will fashion their own rules. Likewise, the federal courts have tended to make their own rules with respect to the details of the distribution of awards between different claimants because of the federal statute broadly giving them such authority.

⁶⁵ 315 U.S. 447 (1942).

⁶⁶ *Id.* at 471.